

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: VID1639/2018
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v PORT
PHILLIP PUBLISHING PTY LTD & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 21/12/2018 3:00:49 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

CONCISE STATEMENT

No. VID



Federal Court of Australia
District Registry: Victoria
Division: General
NPA: Commercial and Corporations, Regulator and Consumer Protection

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

PORT PHILLIP PUBLISHING PTY LTD (ACN 117 765 009) and KRISTAN LEWIS SAYCE

Defendants

A. Important facts giving rise to the claim

- 1. The First Defendant (PPP) is an online publisher of financial commentary, economic analysis, stock market forecasts and investment recommendations. The Second Defendant (Sayce) is and was during the Relevant Period a director of PPP, its chief executive officer, its publisher and the Responsible Manager on PPP's Australian Financial Services Licence (AFSL).
2. Between September 2017 and January 2018 (Relevant Period), PPP was the registrant and operator of the websites www.morningmoney.com.au and www.marketsandmoney.com.au (Websites). During the Relevant Period, PPP held AFSL No. 323988 pursuant to which it was permitted to provide general financial product advice to retail and wholesale clients.
3. During the Relevant Period, PPP published an article entitled 'Everyday Australians Now Legally 'Piggybacking' the Future Fund' ... and collecting extra monthly income injections of \$540 right up to \$6,667' by emailing it to approximately 120,000 subscribers to each of its Websites and by publishing it on its Websites (Article). The Article was directed at retired investors and investors approaching retirement.
4. The Article promoted an investment strategy or portfolio (described in Schedule 1 and referred to as the Investment Strategy) which was said to mimic the Australian Government's Future Fund and the precise details of which were said to be contained in a publication entitled 'Your Quick Start Guide to 'Piggybacking' the Future Fund' (Guide). The Guide was published by PPP in or about September 2017. The Guide could only be received upon paying a \$49 subscription fee.
5. The Article and the Guide contained recommendations and statements of opinion that encouraged and were intended to influence the reader to invest in particular securities, or could reasonably be regarded as being intended to have such an influence, and each of the Article and the Guide therefore contained financial product advice within the meaning of s 12BAB(5) of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) and s 766B(1) of the Corporations Act 2001 (Cth) (Corporations Act).
6. By publishing and disseminating the Article, PPP engaged in misleading or deceptive conduct in relation to a financial service (ie providing financial product advice) or in relation to a financial product by making statements and representations to recipients of the Article that:1

1 A selection of the statements in the Article which give rise to each of the representations referred to in paragraph 6 are set out in Schedule 2.

Filed on behalf of the Plaintiff

Australian Securities and Investments Commission

Prepared by Georgina Thomas

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Address for service

Level 7, 120 Collins Street, Melbourne 3000

- (a) the Article represented the recommendations and opinions of its retirement-income expert, Matthew Hibbard;
 - (b) Mr Hibbard had conducted more than 900 hours of research in relation to the Investment Strategy;
 - (c) Mr Hibbard had connected with over 5,400 investors who had generated income by adopting the Investment Strategy;
 - (d) by adopting the Investment Strategy, investors would receive regular, monthly income;
 - (e) by adopting the Investment Strategy, investors would receive regular monthly income of between \$540 to \$6,667, without disclosing that such returns could only be achieved by investing approximately \$154,286 and \$1.9 million respectively;
 - (f) by adopting the Investment Strategy, investors would generate the same or substantially similar annual returns to that achieved by the Future Fund;
 - (g) the Investment Strategy exposed an investor to assets having the same or substantially similar level of risk as that adopted by the Future Fund in September 2017;² and
 - (h) by adopting the Investment Strategy an investor could mimic the performance of the Future Fund.
7. By publishing and disseminating the Guide, PPP engaged in misleading or deceptive conduct in relation to a financial service (ie providing financial product advice) or in relation to a financial product by making statements and representations to recipients of the Guide that:³
- (a) by adopting the Investment Strategy, investors would generate the same or substantially similar annual returns to that achieved by the Future Fund; and
 - (b) the Investment Strategy exposed an investor to assets having the same or substantially similar level of risk as that adopted by the Future Fund in September 2017;⁴ and
 - (c) by adopting the Investment Strategy an investor could mimic the performance of the Future Fund.
8. Contrary to the matters set out in paragraphs 6 and 7 above, as at September 2017:
- (a) the Article did not represent the opinions of Mr Hibbard. Instead, it was substantially copied by one of PPP's copywriters from an article published by an American related entity of PPP in the United States entitled "*Americans Now Legally Piggybacking Canadian Social Security ... And Collecting Extra Monthly Checks from \$400 to \$4,700*";
 - (b) Mr Hibbard had no qualifications or experience in providing income or investment advice to retired investors or investors approaching retirement;
 - (c) Mr Hibbard had not conducted research in the order of 900 hours in relation to the Investment Strategy;
 - (d) Mr Hibbard had not connected with over 5,400 people who had generated income by adopting the Investment Strategy;
 - (e) PPP had no evidence that any of the alleged 5,400 investors referred to in the Article had generated income by adopting the Investment Strategy;
 - (f) the Investment Strategy had never previously been promoted to PPP's readers or subscribers;

² This representation is implied from the representation referred to in subparagraph (f).

³ A selection of the statements in the Guide which give rise to each of the representations referred to in paragraph 8 are set out in Schedule 3.

⁴ This representation is implied from the representation referred to in subparagraph (a).

- (g) adopting the Investment Strategy would not provide investors with regular monthly income because the Investment Strategy involved investment in the securities of exchange traded funds and listed entities which only paid dividends on a quarterly or half-yearly basis;
 - (h) adopting the Investment Strategy would have generated significantly lower returns⁵ than the returns promoted by the Article and the Guide;
 - (i) the Investment Strategy exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017 because the promoted Investment Strategy was more heavily weighted in favour of growth assets than defensive assets;⁶ and
 - (j) an investor could not mimic the performance of the Future Fund by adopting the Investment Strategy because: (1) it represents a static portfolio whereas the Future Fund's portfolio is dynamic and flexible; (2) the Future Fund has access to strategies and markets that are unavailable to an individual investor; (3) the Future Fund has access to global managers; and (4) the Future Fund is highly diversified globally whereas the Investment Strategy is highly concentrated in Australian equities.⁷
9. Further, to the extent that the above statements and representations were as to a future matter, PPP did not have reasonable grounds for making such statements or representations. For example, PPP had no evidence of any investor having invested in the Investment Strategy because the Investment Strategy had never previously been promoted to PPP's readers or subscribers and neither the copywriter of the Article, nor Mr Hibbard, had calculated:
- (a) the likely returns generated by the Investment Strategy; and
 - (b) whether the likely returns generated by, or risks associated with, the Investment Strategy were similar to that of the Future Fund.

In this regard, ASIC relies on s 12BB of the ASIC Act and s 769C of the Corporations Act.

10. Further, by publishing and disseminating the Article and the Guide, PPP made false or misleading representations in relation to testimonials (or purported testimonials)⁸ by:
- (a) naming Investor A⁹ (as "Jolly") and representing that he had received returns of around \$6,667 per month by adopting the Investment Strategy;
 - (b) naming Investor B¹⁰ (as "Leon M") and representing that he had received returns of around \$540 per month by adopting the Investment Strategy; and
 - (c) naming Investor C¹¹ (as "MH") and representing that he had received returns of around \$1,437.50 per month by adopting the Investment Strategy.
11. Contrary to the matters set out in paragraph 10 above:
- (a) Investor A:
 - (i) had never adopted the Investment Strategy;
 - (ii) had been investing for more than 30 years and had a portfolio worth more than \$1 million;
 - (iii) held a portfolio which only included 1 of the 8 securities promoted by the Investment Strategy; and
 - (iv) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy;

⁵ Particulars will be provided after expert evidence.

⁶ Particulars will be provided after expert evidence.

⁷ Particulars will be provided after expert evidence.

⁸ A selection of the representations which purport to be testimonials is contained in Schedule 2.

⁹ Name has been intentionally withheld.

¹⁰ Name has been intentionally withheld.

¹¹ Name has been intentionally withheld.

- (b) Investor B:
 - (i) had never adopted the Investment Strategy;
 - (ii) held a portfolio which included 18 securities, only 7 of which were securities promoted by the Investment Strategy; and
 - (iii) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy;
 - (c) Investor C:
 - (i) had never adopted the Investment Strategy;
 - (ii) held a portfolio which included 10 securities, only 2 of which were securities promoted by the Investment Strategy;
 - (iii) held a portfolio of which only 20% was invested in securities, the remainder being held as cash; and
 - (iv) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy.
12. Sayce:
- (a) commissioned a PPP copywriter to prepare the Article, and in doing so directed the copywriter to convert an American version of the Article into an Australian version;
 - (b) commissioned Hibbard to prepare the Guide;
 - (c) provided Hibbard with possible stocks to form part of the Investment Strategy promoted in the Article and the Guide;
 - (d) knew that the testimonials of, and income generated by, Forsyth, Mun and Heddle related to their investment in shares generally (and did not relate to the Investment Strategy);
 - (e) reviewed and edited drafts of the Article; and
 - (f) in his role as publisher for PPP approved the Article and the Guide for publication on the Websites and distribution to subscribers.
13. By reason of:
- (a) his role within PPP as set out in paragraph 1; and
 - (b) the matters set out in paragraphs 6 to 12,

Sayce exposed PPP to the risk of declarations of contravention and civil pecuniary penalties and thereby failed to exercise his powers and discharge his duties as a director with the degree of care and diligence that a reasonable person would exercise if they were a director of a corporation in PPP's circumstances and occupied the office held by, and had the same responsibilities within PPP as, Sayce.

B. Summary of the relief sought from the Court

14. ASIC seeks:
- (a) declarations of contravention against PPP and Sayce as set out in its Originating Process dated 20 December 2018;
 - (b) orders pursuant to s 12GBA(1)(a) of the ASIC Act that PPP and Sayce each pay a pecuniary penalty in respect of their contraventions of s 12DB(1)(c) and (d) of the ASIC Act in such amount as the Court considers appropriate;
 - (c) orders pursuant to s 12GBA(1)(c) and (e) of the ASIC Act that Sayce pay a pecuniary penalty in respect of his involvement in the contraventions by PPP of s 12DB(1)(c) and (d) of the ASIC Act in such amount as the Court considers appropriate;

- (d) orders pursuant to s 1317G of the Corporations Act that Sayce pay a pecuniary penalty in respect of his contravention of s 180(1) of the Corporations Act in such amount as the Court considers appropriate;
- (e) orders pursuant to s 12GD(1) of the ASIC Act and/or s 1101B and/or s 1324 of the Corporations Act restraining PPP and Sayce from carrying on a financial services business, or carrying on a business related to, concerning or directed to financial products or financial services within the meaning of s 761A of the Corporations Act, or otherwise providing financial product advice howsoever, for a period to be determined by the Court;
- (f) orders pursuant to s 12GLD(1) of the ASIC Act and/or s 206C(1) of the Corporations Act disqualifying Sayce from managing corporations for a period to be determined by the Court;
- (g) orders pursuant to ss 12GLA(2)(c) and (d) and 12GLB(1) of the ASIC Act, requiring PPP to make corrective disclosures and to publish corrective advertising;
- (h) costs; and
- (i) such further or other relief that the Court deems appropriate.

C. Primary legal grounds for the relief sought

- 15. By engaging in the conduct described above, PPP contravened s 1041H(1) of the Corporations Act and ss 12DA(1) and 12DB(1)(c) and (d) of the ASIC Act.
- 16. By reason of the matters set out in paragraph 12 above, Sayce contravened s 1041H of the Corporations Act and ss 12DA(1) and 12DB(1)(c) and (d) of the ASIC Act. Further or alternatively, Sayce was directly or indirectly, knowingly concerned in, or party to, and/or aided, abetted, counselled or procured, the contraventions by PPP referred to in paragraph 15 above.
- 17. Further, by reason of the matters set out in paragraph 13 above, Sayce contravened s 180(1) of the Corporations Act.
- 18. Further, by reason of PPP's contraventions of the Corporations Act and the ASIC Act, it has contravened s 912A(1)(a) and (c) of the Corporations Act by failing to do all things necessary to ensure that PPP provided financial services honestly, efficiently and fairly, and to comply with the financial services laws.

D. Harm suffered

- 19. The Article was emailed to approximately 120,000 subscribers to each of the Websites and was publicly available on the Websites.
- 20. As a result of the contraventions by PPP and Sayce of the Corporations Act and the ASIC Act, at least 833 recipients of the Article were induced to pay \$49 to receive the Guide and to receive an annual subscription to PPP's "Total Income" information and newsletter service.
- 21. The Investment Strategy was directed at retired investors or investors approaching retirement but:
 - (a) was unable to generate regular monthly income in the amounts promoted in the Article;
 - (b) generated significantly lower returns than the returns promoted by the Article and the Guide; and
 - (c) exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017 because the promoted Investment Strategy was more heavily weighted in favour of growth assets than defensive assets.

Date: 20 December 2018

This concise statement was prepared by Penelope Neskovic QC and Nina Moncrief of Counsel and Georgina Thomas of ASIC.



.....
Signed by Georgina Thomas
Solicitor for the plaintiff

Certificate of lawyer

I, Georgina Thomas, certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the concise statement.

Date: 20 December 2018



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Signed by Georgina Thomas
Solicitor for the Plaintiff

Schedule 1

The Investment Strategy promoted by the Article and the Guide (Mini FF Portfolio)

1. The Investment Strategy promoted by the Article and the Guide was for an investor to invest in the securities recommended by the Guide for each asset class (see paragraph 2 below) in the same proportion as the Future Fund invested in each corresponding asset class (see paragraph 3 below) (**Mini FF Portfolio**).
2. The Guide, at page 13, specifically recommended the following exchange traded funds (**ETF**) and listed securities in respect of each corresponding asset class below:
 - (a) Australian equities – WAM Capital Ltd and BKI Investments Ltd;
 - (b) Global equities – Platinum Capital Ltd;
 - (c) Property and infrastructure – Vanguard Australian Property Securities Index ETF;
 - (d) Debt securities/fixed interest – Vanguard Australian Fixed Interest ETF;
 - (e) Alternative asset classes – BetaShares Australian Top 20 Equity Yield Maximiser Fund, and Australian Leaders Fund; and
 - (f) Cash - Australian High Interest Cash ETF.
3. The Future Fund's asset allocation as at 30 June 2017 was set out on page 2 of the Guide and (rounded to the nearest percent) was:
 - (a) 6% in Australian equities;
 - (b) 15% in developed market equities;
 - (c) 7% in emerging market equities;
 - (d) 12% in private equity;
 - (e) 6% in property;
 - (f) 8% in infrastructure and timberland;
 - (g) 11% in debt securities;
 - (h) 15% in alternative assets; and
 - (i) 21% in cash.

SCHEDULE 2

Statements in the Article giving rise to each of the representations referred to in paragraph 6 above include as follows:

Everyday Australians Now Legally 'Piggybacking'

'THE FUTURE FUND'

... and collecting extra monthly income injections of \$540 right up to \$6,667

Dear Reader,

I recently heard some fascinating claims about a potential 'loophole' in the Australian Government Future Fund...

A loophole that could allow Australians of any location, age or income level to begin collecting income cheques running from \$540 up to \$6,667 per month.

I decided to conduct a full investigation into these claims. I reached out to thousands of Australians and spent months researching the situation.

What I discovered was completely unexpected ... thousands of Australians have managed to 'sneak into' the Future Fund – and are collecting regular, monthly income hits between \$540 and \$6,667, right now as a result.

Here are a few examples from some of our subscribers who are seeing amazing results by 'piggybacking' the Future Fund.

Folks like:

- 77-year-old 'MH', a retired farmer living in South Australia. ... He made a smart move a few years back and began to piggyback the Future Fund. Since then, he's received monthly income amounts like \$81.66 and \$1,437.50.
- Retiree Leon M switched on the piggybacking strategy inside his self-managed super fund ... and collects a monthly income stream of around \$540.

...

To paint a picture of the results you could see when you begin to 'piggyback the Future Fund' ... let me introduce you to a gentleman named Jolly. ... for the last 37 years, he's relied on an extraordinary government-sanctioned income 'loophole' to fund his retirement lifestyle.

Today, this 'loophole' allows him to collect an average \$6,667 income stream every month. ...

All Jolly had to do was follow a plan similar to the one I'll map out for you in this letter. Now an average of \$6,000-plus rolls into his bank account each and every month. ...

And this is the part I want you to remember ... the establishment of the Future Fund has also opened up the potential for regular Aussie investors to mimic the Future Fund's outperformance.

In just a few minutes, I'll reveal how you can use this opportunity to seed yourself inside these world-class, income-producing assets for yourself.

By 'piggybacking' Future Fund style investments – *the way I'll show you today* – you too could become a part-owner in these high income payers.

That's exactly how Jolly from Queensland collects an average of \$6,667 every month. ...

My name is Matt Hibbard.

... I work exclusively as Port Phillip Publishing's retirement-income expert.

I've spent the last six months researching every aspect of this Future Fund income 'loophole'. ...

Along the way I've conducted more than 900 hours of detective work.

I've connected with over 5,400 Australian investors who generate income this way. ...

And I've packed all my analysis ... everything I've uncovered on piggybacking the Future Fund into a brand new, special investor report.

It's called: **Your Quick-Start Guide to 'Piggybacking' the Future Fund.**

You can download this report today...

...

Here's how you could access the Future Fund ... and potentially collect income hits between \$540 and \$6,667 every month

I want to show you how to create a financially-stable retirement by building out a portfolio that mirrors the performance of the Future Fund ... so you too can begin collecting potential income cheques from \$540 ... right up to \$6,667.

In fact, my analysis reveals that Future Fund-style investments I'll introduce you to in the next couple of minutes could outperform Australia's largest sovereign wealth fund by a wide margin.

The Future Fund has achieved standout success by investing billions across a spectrum of eight high-performing, income-producing asset classes.

And I've handpicked a mini-portfolio of seven investments designed to mimic the Future Fund's success in every way. Think of it as your Future Fund 'starter' portfolio.

You'll find each piggyback play inside a brand-new special investor report I've just published.

Inside your special investor report, you'll find my full analysis on your first seven Future Fund-style investments I recommend you buy immediately. Plus, you'll discover an A to Z blueprint on how piggybacking works ... alongside all the risks and rewards.

It's called: **Your Quick-Start Guide to 'Piggybacking' the Future Fund. ...**

This is a comprehensive guide on how to strategically create a winning investment portfolio – a portfolio that mirrors the Future Fund's outsized performance and could pay you for LIFE. ...

Everything you need to know on all seven Future Fund piggyback plays – including the ticker symbol, the rationale for buying now, and the maximum buy-up-to price – is inside your report: '**Your Quick-Start Guide to 'Piggybacking' the Future Fund**'.

You can download this report right now. ...

Sincerely,

Matt Hibbard,

Editor, *Total Income*

SCHEDULE 3

Statements in the Guide giving rise to each of the representations referred to in paragraph 8 above include as follows:

However, while the Future Fund remains purely the province of public servants, the good news is that you too can mimic its performance.

What I want to show you today, though, is what I believe is the best way to piggyback the Future Fund.

What I'm trying to achieve with our own Future Fund portfolio is to give you a portfolio that generates reliable, steady and growing income, while trying to minimise risk as best we can.

As I said at the beginning, the aim is to give you a core income portfolio to mimic the performance of the Future Fund, paying steady income, while trying to minimise risk.